1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable William H. Holly, District Judge of the United States for the Northern District of Illinois on Eighteenth day of June, in the year of our Lord one thousand nine hundred and Thirty-Six, being one of the days of the regular June Term of said Court, begun Monday, the First day of June, and of our Independence the 160th year. Placita.

Present:

Honorable William H. Holly
William H. McDonnell, U. S. Marshal.
Henry W. Freeman, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES.

Northern District of Illinois

Eastern Division

Stanley J. Patryas,
vs
United States of America. } No. 40340

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 15th day of January, 1932.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

Filed Jan. 15, 1932.

* * (Caption—40340) * *

COMPLAINT * WAR RISK INSURANCE.

Plaintiff complains of the defendant and alleges:

I.

That Plaintiff is a citizen of the United States and a resident of the Northern District, Eastern Division of the State of Illinois, and the City of Chicago, County of Cook therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, A. D., 1917, and the World War Veterans' Act of June 7, A. D., 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on or about the 5th day of October, A. D., 1917, plaintiff entered the armed forces of the defendant; that he served

the defendant as a Private in Company "B" 5th Motor Supply Train, from the said 5th day of October, A. D., 1917, to on or about the 29th day of July, A. D., 1919, when he was honorably discharged from said service and that during all of said time he was employed in active service of the defendant.

4

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of Ten Thousand and No/100 ($10,000.00) Dollars by the defendant, who thereafter issued to plaintiff its certificate No. T-1110156 of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said bureaus and the directors thereof, and that during the term of his said service the defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy while he was in service and some time after his discharge.

V.

That while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as Mastorditis Right, Otitis Media, Colesteatoma and Psycho Neurosis, Hysteria, and other disabilities as shown by United States Veterans Bureau file.

VI.

That said diseases, injuries and disabilities have continuously since July 29th, 1919, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain that they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since July 29th, 1919, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

5

VII.

That plaintiff on or about February, 1931, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on November 21, A. D., 1931, disputed plaintiff's claim to said insurance and disagreed with him concerning his rights to the same.

VIII.

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of Fifty-Seven and 50/100 Dollars ($57.50) for each and every month transpiring from July 29, A. D., 1919, and continuously thereafter so long as he lives and continues to be permanently and totally disabled, less such amount as defendant has paid, if any.

IX.

That plaintiff has employed the services of Henry A. Gano, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of Illinois. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended.

X.

Wherefore Plaintiff prays judgment as follows:

First: That plaintiff since July 29, A. D., 1919, has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from the said 29th day of July,

6 A. D., 1919, and continuously so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney a

reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

Henry A. Gano,
Attorney for Plaintiff.

State of Illinois, } ss.
County of Cook. }

Stanley J. Patryas, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge and belief, except as to those matters stated to be upon information and belief and as to those matters he believes it to be true.

Stanley J. Patryas.

Subscribed and sworn to before me this 15th day of January, A. D., 1932.

Mary M. Jordan,
Notary Public.

(Seal)

7 And on, to wit, the 20th day of January, 1932, came the Petitioner by his attorneys and filed in the Clerk's office of said Court a certain Notice in words and figures following to wit: Filed Jan. 20, 1932.

8 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

NOTICE OF FILING PETITION ON GOVERNMENT INSURANCE POLICY OR CERTIFICATE UNDER TUCKER ACT OF MARCH 3, 1887, AND WORLD WAR VETERANS ACT AS AMENDED.

To the Honorable George E. Q. Johnson, United States Attorney for the United States District Court at Chicago, Illinois, Northern District of Illinois, Eastern Division:

Please Take Notice that Petition in the above entitled cause

was duly filed with the Clerk of the United States District Court for the United States District at Chicago, Illinois, Northern District, Eastern Division, on the 15th day of January A. D., 1932, which court has jurisdiction of the cause set forth in said Petition and in which district petitioner resides.

Dated at Chicago, Illinois, this 15th day of January, A. D. 1932.

Henry A. Gano,
Attorney for Petitioner.

Received copy of the within notice of filing Petition against the United States under the Tucker Act, together with copy of said Petition and Summons is hereby admitted this 15th day of January A. D. 1932.

George E. Q. Johnson.

Filed May 11, 1936.

9 And on, to wit, the 11th day of May, 1936 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Answer in words and figures following, to wit:

10 In the District Court of the United States.

* * (Caption—40340) * *

ANSWER.

Comes now the defendant in the above styled cause by Michael L. Igoe, United States Attorney, Edmond Sullivan, Assistant United States Attorney, and William M. Lytle, Attorney, Department of Justice, attorneys of record for the defendant in the above styled cause and for answer to plaintiff's petition alleges:

I.

The defendant denies for want of information or belief that the plaintiff, Stanley J. Patryas, is a citizen of the United States, resident of the Northern District of Illinois, Eastern Division, City of Chicago, County of Cook.

II.

The defendant admits that this action is brought by the plaintiff under the terms of the War Risk Insurance Act of

October 6, 1917, and the World War Veterans' Act of 1924, as amended July 3, 1930, and is based upon contracts of insurance issued by the United States of America, under and by virtue of said Acts to the plaintiff.

III.

The defendant admits that the plaintiff, Stanley J. Patryas, enlisted in the military service of the United States on October 5, 1917, and served in such military service from the said date of his enlistment until July 29, 1919, on which
11 date he was discharged from said military service. The defendant admits that the plaintiff was in the active military service from October 5, 1917 until July 29, 1919.

Count One.

I.

The defendant admits, that while a member of the military forces of the United States, the plaintiff, Stanley J. Patryas, applied for, by his written application dated January 31, 1918, war risk yearly renewable term insurance in the principal sum of $10,000 and admits further that premiums on the said insurance were deducted from the plaintiff's monthly military service pay up to and including the month of July 1919, but states that no further premiums were paid on the said war risk yearly renewable term insurance contract by the plaintiff or by any one on his behalf thereafter.

II.

The defendant denies, that while in the military service of the United States the plaintiff, Stanley J. Patryas, contracted any diseases, injuries or disabilities, and denies, in particular, that the veteran plaintiff contracted diseases, injuries or disabilities resulting in and known as: mastoiditis, right; otitis media; cholesteatoma; psycho-neurosis and hysteria.

III.

The defendant denies the allegations contained in this paragraph of the plaintiff's petition in their entireties.

IV.

The defendant denies that the plaintiff filed a claim with or made application to the defendant through its Veterans' Bureau and the Director thereof, for the payment of the benefits of war risk yearly renewable term insurance on January 26, 1931, or at any other time on or prior to July 3, 1931.

The defendant admits that the Insurance Claims Council of the United States Veterans' Administration has refused to pay to the plaintiff the benefits of war risk yearly renewable term insurance and has denied that he was permanently and totally disabled when his contract of insurance was in full force and effect. The defendant states, therefore, that this lawsuit is and was, at the time it was filed, barred by the statute of limitations, by reason of the provisions of Section 19 of the Act of July 3, 1930, inasmuch as no claim for war risk yearly renewable term insurance was filed in and with the United States Veterans' Administration on or prior to July 3, 1931.

V.

The defendant denies that the plaintiff is entitled to the payment of $57.50 per month for any period or from any period whatsoever, and denies further that the plaintiff was, at any time, permanently and totally disabled when his war risk yearly renewable term insurance contract was in full force and effect.

VI.

The defendant admits that the plaintiff has employed the services of Henry A. Gano and Stephen A. Cross, attorneys and counsellors at law, and that they are duly licensed and admitted to practice before this honorable court, and that ten percent of the amount of the judgment recovered, if any, is a reasonable attorneys' fee.

Wherefore, the defendant prays that Count One (1) of plaintiff's petition be dismissed, that plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with costs, and for such other and further relief as may to the court seem meet and proper, the premises considered.

Count Two.

I.

The defendant admits that, while in the military service and on January 31, 1918, the plaintiff applied for and was granted by the defendant war risk yearly renewable term insurance in the principal sum of $10,000, but states that this insurance lapsed for non-payment of premiums on August 1, 1919, and was reinstated in the full amount of $10,000 on July 1, 1927. The defendant admits further that upon the date of such reinstatement of the said $10,000 war risk yearly
13 renewable term insurance it was converted in the said full amount into a United States Government Five-Year convertible term policy and that premiums were paid on such Five-Year converted policy up to and including at least the month of January 1932, but states that no premiums were paid on such Five-Year converted term policy subsequent to the month of May 1932, further that there is a lien in favor of and payable to the defendant against such converted policy in the amount of $773.90, for which the defendant demands payment from the plaintiff, in the event of a recovery from the defendant in this lawsuit, with interest from the date of the attachment of said lien, namely, July 1, 1927. The defendant also admits that the number of the said United States Government Five-Year convertible policy is K-773-730.

II.

The defendant denies that the plaintiff became totally and permanently disabled on or prior to January 26, 1931, and denies further that the said United States Government Five-Year convertible term policy matured on or prior to January 26, 1931.

The defendant admits that on to-wit: January 26, 1931, the plaintiff made application to the defendant through its United States Veterans' Bureau and the Director thereof for the payment of the benefits of said United States Government Five-Year converted term policy #K-773-730, on account of the alleged total and permanent disability of the plaintiff, but denies that on May 25, 1931 the plaintiff made due proof of his total and permanent disability to the United States Veterans' Bureau or to the defendant.

The defendant admits that on November 21, 1931 the Insurance Claims Council of the United States Veterans' Bureau considered the plaintiff's claim for said insurance benefits and denied the said claim, and admits further that a letter containing notification of the said denial by the Insurance Claims Council was dated at Washington, D. C. November 26, 1931, signed by the Director of Insurance of the United States Veterans' Bureau, and addressed to the plaintiff at Chicago, Illinois.

14 The defendant denies that the plaintiff is entitled to the payment of $57.50 per month from any date or for any period whatsoever, and denies further that the plaintiff became permanently and totally disabled on or prior to to-wit: January 26, 1931, and denies further that the plaintiff is entitled to the return, by the defendant, of any premiums paid on the said insurance contract for any period or from any date.

III.

The defendant admits that the plaintiff has employed the services of Henry A. Gano and Stephen A. Cross, attorneys and counsellors at law, and that they are duly licensed and admitted to practice before this honorable court, and that ten percent of the amount of the judgment recovered, if any, is a reasonable attorneys' fee.

Wherefore, the defendant prays that Count Two (2) of plaintiff's petition be dismissed, that plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with costs, and for such other and further relief as may to the court seem meet and proper, the premises considered.

/s/ M. L. Igoe,
Michael L. Igoe,
United States Attorney.
By: /s/ Edmond Sullivan,
Edmond Sullivan,
Assistant U. S. Attorney.
/s/ Wm. M. Lytle,
Wm. M. Lytle,
Attorney, Department of Justice.

15 And on, to wit, the 14th day of April, 1936 came the Petitioner by his attorneys and filed in the Clerk's office of said Court a certain Amended Petition in words and figures following, to wit: Filed Apr. 1936.

16 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

AMENDED PETITION FOR WAR RISK INSURANCE.

Comes now the Plaintiff by leave of Court first had and obtained and files herewith an amended complaint or petition and alleges:

That the Plaintiff is a citizen of the United States and a resident of the Northern District of Illinois, in the Eastern Division, and the City of Chicago and County of Cook therein.

That this action is brought under the War Risk Insurance Act of 1917 and the World War Veterans' Act of 1924, and amendments and supplements thereto, and is based upon a policy or policies, certificate or certificates of insurance issued under said Acts to the Plaintiff by the Defendant.

That on or about the 5th day of October, A. D. 1917 Plaintiff entered the armed forces of the Defendant; that he served the Defendant as a private from the said 5th day of October, 1917, to on or about the 29th day of July, 1919 when he was honorably discharged from said service and that during all of said time he was employed in the active service of the Defendant.

Count 1.

1. That immediately after entering the Defendant's service Plaintiff made application for and was granted insurance in the sum of Ten Thousand And No/100ths ($10,000.00) Dollars by the Defendant, who thereafter on, to-wit, January 31, 1918, issued to Plaintiff its certificate No. T-1,110,156 of his compliance with said acts, so as to entitle him and his
17 beneficiaries to the benefits of said acts, and the rules and regulations of said bureau and the director thereof, and that during the term of his said service the Defendant deducted from his pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the Defendant. That Plaintiff paid all pre-

miums promptly when the same became due on said policy while he was in service and after his discharge, until to-wit, August 1, 1919.

2. That while serving the Defendant as aforesaid, the Plaintiff contracted certain diseases, injuries and disabilities resulting in and known as Mastoiditis Right, Otitis Media, Cholesteatima and Psycho-neurosis, Hysteria, and other disabilities as shown by United States Veterans' Bureau file.

3. That said diseases, injuries and disabilities have continuously since July 29th, 1919, rendered and still do render the Plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout Plaintiff's lifetime in approximately the same degree. That Plaintiff has been, ever since July 29th, 1919, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

4. That Plaintiff on or about the 26th day of January, A. D., 1931, made application to the Defendant, through its Veterans' Bureau and the Director thereof, for the payment of his insurance because of permanent and total disability, and that said Veterans' Bureau, and the Director thereof have refused to pay Plaintiff said insurance and on November 21, A. D., 1931 the Insurance Claims Council denied said claim for insurance and afterwards on November 26th, 1931, in a letter addressed to the Plaintiff, the Director of Insurance advised him that his said claim had been denied, which said letter was received by the Plaintiff so that a disagreement now exists between Petitioner and the Veterans Administration concerning his said claim.

18 5. That under the provisions of the said acts and other acts amendatory thereof, Plaintiff is entitled to the payment of Fifty Seven and 50/100ths Dollars ($57.50) for each and every month transpiring from the date he became totally and permanently disabled on or before to-wit, July 29, A. D., 1919, and continuously thereafter so long as he lives and continues to be permanently and totally disabled, less such amount as Defendant has paid, if any.

6. That Plaintiff has employed the services of Henry A. Gano, and Stephen A. Cross, attorneys and counsellors at law, duly licensed and admitted to practice before this court and all courts of the State of Illinois. That a reasonable attorney's fee to be allowed to Plaintiff's attorneys for their

services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended.

7. Wherefore Plaintiff prays judgment as follows:

First: That Plaintiff since, to-wit, July 29, A. D., 1919, and/or while his said insurance was in full force and effect, has been and still is, permanently and totally disabled.

Second: That Plaintiff has judgment against the Defendant for all of the monthly installments of $57.50 per month for each and every month from the said 29th day of July, A. D., 1919, or such date during the life of said policy when plaintiff became totally and permanently disabled, and continuously so long as he lives and remains permanently and totally disabled.

Third: Determining and allowing to Plaintiff's attorneys a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

19 Count 2.

1. That immediately after entering the Defendant's service, the Plaintiff made application for and was granted Insurance in the sum of Ten Thousand Dollars ($10,000.00) and afterwards, on, to-wit, July 1, 1927, his said War Risk Term Insurance was converted to a five year convertible term policy and the Defendant issued to him a certificate or policy of insurance bearing Number K-773730 of his compliance with the acts so as to entitle him and his beneficiary to the benefits of said Act and the rules and regulations of the said Veterans' Bureau and the Directors thereof with reference to United States of America converted life insurance and that the Plaintiff paid the monthly premiums provided for in said policy when the same became due until to-wit, the 1st day of February, 1932, when the Plaintiff, by reason of his having previously become permanently and totally disabled, thereby causing the maturing of said policy, ceased to pay premiums thereon.

2. That the said policy of insurance, among other things, provided:

"Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person."

and Plaintiff alleges that afterwards and prior to, to-wit, January 26, 1931, he became totally and permanently disabled and became and was rendered continuously unable to follow any substantially gainful occupation and was then and is now reasonably certain that such disability would continue throughout his life, so that the said insurance matured on and prior to said January 26, 1931.

That on to-wit, January 26, 1931, Plaintiff made application to the Defendant through its Veterans' Bureau and the Director thereof for the payment of his said insurance because of said total and permanent disability and thereafter on, to-wit, the 25th day of May, 1931, made due proof of his total permanent disability to the Veterans' Bureau of the Defendant and the said Insurance Claims Council of the Veterans' Bureau afterwards on, to-wit, November 21, 1931, considered his said claim and denied Plaintiff's said claim to said insurance and afterwards on November 26, 1931, in a letter signed by the Director of Insurance advised him of the said action of the Insurance Claims Council and that his insurance had been denied. By reason whereof a disagreement then existed and now exists between the Veterans' Bureau and the claimant, petitioner herein.

That under the provision of said Act and other Acts amendatory thereof and supplementary thereto, Plaintiff is entitled to the payment of $57.50 for each and every month from and after the date when he became permanently and totally disabled and continuously thereafter so long as he lives and continues to be permanently and totally disabled and is further entitled to the return of all premiums paid by him upon said insurance from and after July 26th, 1930, being six months prior to the date of making claim for said insurance.

3. That Plaintiff has employed the services of Henry A. Gano and Stephen A. Cross, attorneys and counsellors at law, duly licensed and admitted to practice before this Court and all Courts of the State of Illinois. That a reasonable attor-

ney's fee to be allowed to Plaintiff's attorneys for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended.

Wherefore Plaintiff prays judgment as follows:

1. That the Plaintiff, since prior to, to-wit, July 1, 1930, and/or while his said convertible War Risk Insurance was in full force and effect, has been and still is permanently and totally disabled.

2. That Plaintiff have judgment against the Defendant for all of the monthly installments of Fifty Seven and 50/100ths Dollars ($57.50) per month for each and every month
21 from, to-wit, July 1, 1930, or such date during the life of said policy when Plaintiff became totally and permanently disabled and continuously so long as he lives and remains permanently and totally disabled, and that she have and recover from the Defendant all premiums paid by him since he became totally and permanently disabled and made proof thereof to the Veterans' Bureau of the Defendant.

3. Determining and allowing to Plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

/s/ Stephen A. Cross & Henry A. Gano,
Attorneys for Plaintiff.

22 State of Illinois } ss
County of Cook }

Stanley J. Patryas being first duly sworn, says that he is the Plaintiff in the above entitled action; that he has read the foregoing complaint and each and every count thereof; and that each count thereof is true to his own best knowledge, information and belief.

/s/ Stanley J. Patryas.

Subscribed and sworn to before me this 10th day of April, A. D. 1936.

/s/ Stephen A. Cross,
Notary Public.

(Seal)

tered Apr. 14, 1936.

23 And afterwards, to wit, on the 14th day of April, 1936, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly District Judge appears the following entry, to wit:

24 IN THE DISTRICT COURT OF THE UNITED STATES.

April 14, 1936.

Present: Honorable William H. Holly, Judge of Said Court.

* * (Caption—40340) * *

It Is Ordered that leave be and the same is hereby given plaintiff to file instanter Amended Petition and trial continued to May 12, 1936.

tered May 28, 1936.

25 And afterwards, to wit, on the 28th day of May, 1936, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly District Judge appears the following entry, to wit:

26 IN THE DISTRICT COURT OF THE UNITED STATES.

May 28, 1936.

Present: Honorable William H. Holly, Judge of said Court.

* * (Caption—40340) * *

This day again come the parties to this suit by their attorneys respectively and the Jury heretofore impaneled herein for the trial of said cause also come and the Court reserves its ruling on the government's motion at close of all the evidence for a directed verdict until after the return of the verdict and the Jury having heard the evidence by the parties adduced arguments of counsel and charge of the Court retire to their room with sworn Bailiffs to consider of their verdict and during their absence the usual hour of adjournment having arrived

It Is Ordered that when said Jury shall have agreed upon their verdict they shall reduce the same to writing sign and seal the same and they are hereby permitted to separate thereupon all here in open court expressly waive the polling of the Jury after a verdict has been rendered.

27 And on, to wit, the 20th day of May, 1936 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to-wit: Entered M 20, 1936.

28 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—40340) * *

We, the Jury, find the issues for the Plaintiff and we fix the date of his permanent and total disability at The latter part of (1924).

/s/ Philip W. Upp,
Foreman.
/s/ Julius T. Kamenske,
/s/ George Sanders,
/s/ H. H. Higgins,
/s/ L. S. Paddock,
/s/ Anton P. Gabel,
/s/ Thomas J. Pierce,
/s/ James W. Ashby,
/s/ Sam Carahan,
/s/ Robert A. Irvine,
/s/ James P. Atkinson,
/s/ F. William Beere.

29 And afterwards, to wit, on the 13th day of June, 1936, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly District Judge appears the following entry, to wit:

30 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—40340) * *

June 13th, 1936.

Present: Honorable William H. Holly, Judge of said Court.

This day comes the defendant by its attorney and enters herein its motion for judgment on the verdict heretofore entered herein which motion is overruled to which ruling of the Court the defendant by its attorney duly excepts, whereupon the defendant by its attorney enters herein its motion for a

new trial and arrest of judgment which motion is also overruled and denied to which ruling of the court the defendant by its attorney duly excepts, and 90 days time from this date is allowed to file Bill of Exception herein.

red June 1936.

31 And afterwards, to wit, on the 18th day of June, 1936, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

32 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

JUDGMENT.

This cause having come on to be heard and the evidence having been submitted to a jury and the jury having returned its verdict finding the issues in favor of the Plaintiff and against the defendant.

It Is Therefore Ordered, Adjudged and Decreed that the Plaintiff is entitled to judgment upon the said verdict and that the Plaintiff Stanley J. Patryas do have and recover from the United States of America the sum of Thirty Seven Hundred Thirty Seven and 50/100ths Dollars ($3,737.50) as accrued monthly installments of insurance benefits at the rate of Fifty Seven and 50/100ths Dollars ($57.50) per month beginning January 25, 1931 up to and including May 25, 1936, unless the sum of Eleven Hundred Ninety Eight and 49/100ths Dollars ($1;198.49), being a lien of Seven Hundred Seventy Three and 90/100ths Dollars ($773.90) established by Stanley J. Patryas against his converted insurance on July 1, 1927, together with interest thereon at five per cent (5%) compounded annually from July 1, 1927 to June 18, 1936.

It Is Further Ordered, Adjudged and Decreed that the Defendant, United States of America, deduct 10% of the amount of insurance sued upon and involved in this action and pay the same to Stephen A. Cross, attorney for the Plaintiff for his services rendered before this Court, payable at the rate of 1/10 of all back payments and 1/10 of all future payment

made to the Plaintiff or his beneficiary which may hereafter become due on account of said insurance.

Enter:

WILLIAM H. HOLLY,
United States District Judge.

To which findings and judgment entered for the Plaintiff and Defendant, United States of America, duly objects and takes an exception, which exception is hereby allowed.

Whereupon the Defendant moves in arrest of judgment and for a new trial which motions the court overrules and to said action of the Court in overruling the Defendant's motions in arrest of judgment and for a new trial the Defendant excepts, which exception is hereby allowed. Whereupon, upon the motion of the Defendant, the time in which to file its bill of exceptions is extended for 90 days from and after this date.

33 And on, to wit, the 14th day of November, 1936, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Bill of Exceptions in words and figures following, to wit: Bill of Exceptions filed Nov. 14,

34 * * (Caption—40340) * *

BILL OF EXCEPTIONS.

Be it remembered that on the 26th day of May, A. D. 1936, being one of the days of the May Term of the said Court, this cause came on for trial upon the issue joined before the Honorable William H. Holly, one of the judges of the court, on the common law side thereof, and before a jury.

Stephen A. Cross, Kenneth B. Kirk, and Henry A. Gano, Esquires, appeared for the petitioner, and M. L. Igoe, United States Attorney, Edmond Sullivan, Assistant United States Attorney, and William M. Lytle, Attorney Department of Justice, appeared for the defendant.

It was stipulated by and between the parties to the cause that the insured, Stanley Patryas, entered the United States Army on October 5, 1917, and was discharged therefrom July 29, 1919.

It was further stipulated that on January 31, 1918, Stan-

ley J. Patryas, applied for and there was issued to him
35 yearly renewable term War Risk Insurance in the principal sum of $10,000.00; that on August 31, 1919, this insurance lapsed for non-payment of premiums.

That on June 28, 1927, the full amount of this insurance was reinstated by the said Stanley J. Patryas, and that at the same time it was converted into a five year convertible term policy on which premiums were paid up to and including the month of May, 1932, and that this converted policy lapsed on July 1, 1932 for non-payment of premiums.

It was stipulated that the first count in the petition which claimed recovery under the yearly renewable term insurance policy might be dismissed and recovery was relied on in the second count, which claimed recovery under the converted policy.

It was stipulated that the claim for benefits of insurance under policy No. K-773-730, the converted insurance was filed in the United States Veterans Bureau on January 6, 1931.

And thereupon, to maintain the issues on his part, the plaintiff, offered, and there was received in evidence, plaintiff's Exhibit One, in words and figures as follows:

In substance plaintiff's Exhibit One is a five year convertible policy of insurance issued by the United States of America to Stanley J. Patryas in the principal sum of $10,000.00, which takes effect on the first of July, 1927, one of the terms and conditions of which was:

36 "Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation, and which is founded upon conditions which render it reasonably certain that the total disability will continue throughout the life of the disabled person. The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and any premiums paid after receipt of due proof of total permanent disability, and within the six months, shall be refunded without interest."

The policy further provided:

"Upon due proof of the total permanent disability of the insured while this policy is in force the monthly installment shall, except as hereinafter provided, be payable to the insured. * * *"

There was offered and received in evidence Plaintiff's Ex-

hibit No. 2, on official form No. 579 of the United States Veteran's Bureau, showing a claim for permanent and total disability insurance benefits filed with the United States Veterans Bureau on May 2, 1931, by the insured, Stanley J. Patryas. This claim was in regard to the converted insurance policy No. K 773-730.

There was offered and received in evidence Plaintiff's Exhibit No. 3, being on official form No. 535 of the United States Veterans Bureau, marked as received May 13, 1931, United States Veterans Bureau, filed by the insured, Stanley J. Patryas, in which he said in regard to his post was occupation that since discharge from military service his occupation has been finisher at the Northwestern Terra-Cotta Company on Clybourn Avenue in Chicago; that he worked there on and off on account of illness from 1920 to August 1, 1924,
37 but he was unable to work since; that the usual number of hours worked per day were nine or less, with irregular weekly wages; that his physical condition has been responsible for loss of time because of periodical mental spells, as well as other ailments, eczema, chest, anemic, amnesia, heart and stomach disorders, neurasthenia, psychoneurosis, hysteria-tentative, vertigo, extremely nervous, etc., destruction of both mastoid cells, and poor memory; that he has not been able to do his full share of work and compete with men employed in the same occupation because of periodical mental spells as well as other ailments, and he was unable to do any work at all from August 2, 1924, because he was physically disabled.

There was offered and received in evidence Plaintiff Exhibit No. 4, being a report of a Neuro-Psychiatric Examination made by Royal Fitch, a Neuro-Psychiatric Examiner with the United States Veterans Bureau, dated August 5, 1924, which examination related to the petitioner, Stanley Patryas, and stated that his subjective symptoms were as follows:

"My stomach bothers me. Feels like I have a lump in it. It makes me sick and dizzy. I get awfully weak and sometimes I faint. It squeezes me through the abdomen and makes me shake all over. My nerves are getting all upset. After I eat I vomit and feel bad. My right ear bothers me. I can't hear good. Sometimes pus runs out of it."

Under "Mental Status" the examination recited that he has a Fourth grade education but they taught him nothing but religion. Orderly and cooperative. Intelligence, judg-

ment, insight and general knowledge limited. Claimant is definitely neurasthenic.

38 Under "Physical and Neurological Findings" the report recited well developed, well nourished white male. Pupils equal and react to light and accomodation. Thyroid negative. Was referred to eye, ear, nose, and throat Examiner for examination. Deep and superficial reflexes brisk and equal. No Romberg, no Babinski, clonus or incoordination. Claimant referred for x-ray examination of G. I. tract. Diagnosis psychoneurosis neurasthenia on a constitutional inferiority basis. Prognosis, unfavorable; condition is constitutional. Claimant is able to resume his prewar occupation, is not bedridden, is able to travel, and is unattended. Hospital care is not advised. Claimant will not accept it. Claimant has a vocational handicap disability of 10 percent. Mental and physical condition such that training is not feasible.

There was offered and received in evidence Plaintiff's Exhibit No. 5, which was a report of a Special eye, ear, nose, and throat examination dated August 6, 1924, and signed by Harlan E. Mize, attending specialist in charge of eye, ear, nose, and throat section of the Veterans Administration. This report bore a diagnosis of Chronic catarrhal otitis media, right ear eczema, canal right, prognosis fair.

There was offered and received in evidence Plaintiff's Exhibit 6, which was the report of a physical examination of Stanley J. Patryas from the files of the U. S. Veterans

39 Bureau made by Dr. M. M. Kulvin, Medical Examiner, which listed the present complaints as pain in upper abdomen about 1½ hour after eating which lasts from two hours to all day long; relieved by belching and vomiting; loss of weight; nervous; shivers; gets weak when he gets this pain; on belching feels warm all over and then gets cold flashes; tires easily; sleeps poorly; poor hearing right ear. Physical examination revealed a slight under nourished white male, eyes negative, nose negative, throat negative; impaired hearing in the right ear; no impairment of resonance; breath sounds normal in the chest. Heart, no enlargment, no murmurs, no accentuation of tones at the base, blood pressure 132-90; Pulse 84. Abdomen, slight tenderness in epigastrium; no masses felt; no swelling; no tenderness; inguinal rings closed. Referred to Neuro-Psychiatrical Section for examination, and it is advised to hospitalize the claimant for a period of observation because of the indefinite picture of the G. I. condition. Diagnosis chronic catarrhal otitis media,

right; deviation of septum; chronic gastritis; neurasthenia; Is able to resume his prewar occupation. Not able to work at present.

There was offered and received in evidence Plaintiff's Exhibit No. 7, dated August 8, 1924, being the report of an X-ray reading of the Gastro-Intestinal Tract of Stanley J. Patryas. The conclusion was that there was no outstanding evidences of distinct lesion of the duodenum or stomach such as duodenal ulcer or malignancy. However, there are certain
40 suggestions of a possible lesion in the first part of the duodenum. This lacks definiteness and should be considered with a clinical evidence, for or against ulcer, etc.

There was offered and received in evidence Plaintiff's Exhibit No. 8, being a report of an Eye, Ear, Nose, and Throat examination made by Harlan E. Mize, Attending Specialist, under date of September 4, 1924, in which a diagnosis was made of chronic catarrhal otitis media, right ear. Eustachian Catarrh. Prognosis, only fair right ear.

There was offered and received in evidence Plaintiff Exhibit No. 9, dated October 14, 1924, being a report of a physical examination of Stanley J. Patryas, made by the United States Veterans Bureau. Chief complaint made by the claimant was partial deafness in the right ear, and pain in abdomen, and continual headaches which make him nervous. Diagnosis was otitis media, chronic catarrhal right ear. The following notation also appears:

"Taking into consideration the lake of pathology shown on X ray, absence of findings on physical examination and marked evidence of Neuro-Psychiatric disease present, it is believed that this patient's disability is entirely of a Neuro-Psychiatric character and that there is no gastro-intestinal disease present."

When this examination was made the patient had been admitted to the hospital on the 26th of August, 1924, and was marked discharged on the 28th of September, 1924, because he was absent without leave. Report recites that he left on
41 the 19th of September because his wife was having an operation, and the patient never returned.

There was offered and received in evidence the report of a physical examination of Stanley Patryas, made by the United States Veterans Bureau, marked Plaintiff's Exhibit No. 10, dated December 30, 1924. As a result of a general physical examination on this date it was found that Patryas had a deviated nasal septum; chronic bronchitis, mild; as a

result of the special eye, ear, nose and throat examination, it was found that he had otitis media; chronic catarrhal, right, slight; deviated nasal septum; naso-pharyngitis, chronic. As a result of a special Neuro-Psychiatrical examination on this same date, it was diagnosed that Patryas was psychoneurosis, neuresthenia with mild anxiety features on an inadequate personality basis; prognosis was favorable for ultimate adjustments.

There was offered and received in evidence Plaintiff's Exhibit No. 11, which was the report of a physical examination of Patryas made on May 19, 1925, in which it was found, as a result of a general physical examination, "general physical findings insufficient to account for physical complaints except on a functional basis." On this same day Patryas was given a Neuro-Psychiatrical examination in which the diagnosis was made "constitutional inferiority with hysterical manifestations." A special chest examination was made with the diagnosis chronic bronchitis and chronic fibrous pleurisy. As a result of an eye, ear, nose, and throat examination a
42 diagnosis was made of chronic catarrhal otitis media right ear; eczema canal right ear.

There was offered and received in evidence Plaintiff's Exhibit No. 12, which was the report of an examination of Stanley J. Patryas on August 27, 1926, in which a diagnosis was made of psychoneurosis hysteria, and also suppurative otitis media, right, with nerve deafness.

There was offered and received in evidence Plaintiff's Exhibit No. 13, which was the report of a physical examination dated June 27, 1927, made by the United States Veterans Bureau in which the diagnosis was chronic mastoiditis right; nerve deafness bilateral. As a result of a special Neuro-Psychiatrical examination on the same day, the diagnosis was made of Constitutional psychopathic inferior, Mild Hysterical manifestations of Hypochondriacal nature.

There was offered and received in evidence Plaintiff Exhibit No. 14, being a report of a physical examination of Patryas dated August 22, 1927, in which the general physical examination showed negative findings except that as to the eye, ear, nose, and throat findings there was a diagnosis made of chronic otitis media, suppurative, right; and congestion of the middle turbinate, left ear. As a result of a Neuro-Psychiatrical examination made on that day a diagnosis was made of hysteria, moderately severe; and in the opinion of the ex-

aminers further hospitalization in all probability will not benefit his neuropsychiatric disability.

43 There was offered and received in evidence Plaintiff's Exhibit No. 15, which was a report of a Board of Medical Officers for the purpose of examining all patients prior to discharge to determine whether such discharge was to be recommended, which report is dated September 30, 1927. In this report it was recited that the patient was admitted to the hospital July 3, 1927 from the Chicago Regional Office with the diagnosismastoiditis, right, this being a re-admission. He previously had been discharged September 28, 1924. Following complete examination his disabilities were diagnosed as: (1) Otitis media, chronic, suppurative, right, with cholesteatoma; (2) Otitis media, chronic, suppurative, left, quescent; (3) Hysteria, moderately severe; (4) Absence acquired teeth 6, 12, 13, 14, 19, 24, 25, 30; (5) Caries, teeth 10, 31. Sequelae; deafness, right post-operative. Patient received an operation July 19, 1927 at which time a right radical mastoidectomy was performed with good results. The wound is completely healed and the condition greatly improved. A complete deafness on this side exists, however, as a sequel to the operation. No treatment is recommented for his hysteria and the indicated dental treatment is not recommended as it cannot be considered as adjunct to the disability for which hospitalized. No further treatment is indicated for his ear condition, and discharge is recommended as having reached maximum benefit.

44 There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 16, dated October 10, 1927, which was a supplemental examination to the report of August 22, 1927. Diagnosis Chronic otitis media, suppurative, right; chronic otitis media, suppurative, right, quiescent; deafness, right ear, postoperative; disability 50 percent. Diagnosis on admission, Mastoiditis right. This examination also repeats the diagnosis made in Plaintiff's Exhibit No. 15.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 17, being a report of an X-Ray consultation on Mastoids in which it was said "both mastoid areas present shadows that are at variance to the normal. There appears to be a sclerosis of the upper portion of the right mastoid, but the underlying structure seems more transparent than normal, with no definite cell outlines visible. I would regard this as evidence of pathology. The left mastoid area shows a few small cells and several large ones. Whether this is an indi-

vidual variation or represents the effects of disease, caries, and absorption is questionable."

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 18, which was a report of a Neuropsychiatric examination of Patryas dated August 8, 1928, in which the diagnosis was made of Psychoneurosis, hysteria with organic factors, severe.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 19, which was a report of a physical examination of Patryas made on April 4, 1929, in which a diagnosis was made of constitutional psychopathic inferiority with
45 egocentric trends.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 20, being a report of a Neuropsychiatric examination of Patryas on April 4, 1930, in which a diagnosis of Phychoneurosis, hysteria with organic factors, was made.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 21, being a report of an examination dated May 6, 1930, in which, as a result of a general physical examination, a diagnosis was made of deafness, nerve, right ear; cicatrix, P. O. Mastoid; otitis media, chronic right ear supperative; perforation left drum membrane. As a result of a special Cardio-Vascular examination, a diagnosis was made of no Cardio-Vascular Disease found, and with a normal heart. As a result of a special chest examination a diagnosis was made of bronchitis, chronic, mild. As a result of a Neuropsychiatric examination a diagnosis was made of hysteria, moderate, phychoneurosis with organic factors on a Constitutional Phychopathic Inferiority basis.

There was offered and received in evidence PLAINTIFF EXHIBIT NO. 22, which was a report of a physical examination made on August 29, 1930, in which a diagnosis was made of hysteria, tentative; deafness, complete, right ear; deafness, moderate, left ear; acute mastoiditis not found. As a result of a Neuropsychiatric examination made September 11, 1930, a diagnosis was made of hysteria, moderate, with organic
46 factors on a constitutional psychopathic inferiority basis.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 23, being the report of a Neuropsychiatric examination made June 29, 1931, in which diagnosis was made Hysteria, moderate, with organic factors on a constitutional phychopathic inferiority basis.

There was offered and received in evidence PLAINTIFF'S EXHIBIT NO. 24, being a report of a Neuropsychiatric examination dated December 7, 1932, in which the diagnosis was made Hysteria, moderate, with organic factors on constitutional phychopathic inferiority basis.

There was offered and received in evidence PLAINTIFF EXHIBIT NO. 25, being a report of an examination under date of July 28, 1933, in which a diagnosis was made of no general disability. From a report of a Special ear, nose and throat examination diagnosis was made of deafness, complete right. Cicatrix, mastoidectomy, right. As a result of a Neuropsychiatric examination a diagnosis was made of hysteria on a constitutional inferiority basis with organic factors, completely mal-adjusted.

47 ALBERT SCHUTTENMAHIER, called as a witness on behalf of the plaintiff, bestified as follows:

Lives at 1237 Cleaver Street and is a metal polisher employed by Crane and Company. Knows the plaintiff Stanley Patryas since 1913. Before going into the army Patryas was in excellent health. After both he and Patryas went into the army and came back, he did not see Patryas again until 1925. Patryas lived across the street from him. When he saw Patryas in 1925 was not able to recognize him. The difference was in his looks and in his mind, and it seemed something was wrong with him, something was ailing him badly. Patryas' words were not right. He couldn't speak words and he had a terrible smell. Patryas' tongue was twisted and he was nervous. He looked poorly in 1925 compared with when he went in the army, and was lacking in weight. Around 1925 visited Patryas in his home. Patryas was nervous at this time. Patryas' wife sent their children over to his house to tell him to come over, and when he arrived there Patryas' mind was out of control. Patryas' mouth was open, and he was vomiting, and he could not stand to look at him. After that he saw him two or three months later. Patryas was preparing to go to Hines Hospital, but he was not quite so nervous. In another few months in the year 1926, Patryas was downhearted, but he didn't ask Patryas what the trouble was.

48 Following this meeting he saw Patryas about every week along the street. In about 1929 Patryas moved away from that street. Patryas moved to Eddy Street in 1931, so

that from 1926 until 1931 he did not see Patryas. In 1931 he went to see Patryas at his home in Eddy Street. He rapped at the door and Mrs. Patryas came out. He saw Patryas, who did not act right. Patryas was telling him this and that, and how he would like to go here and there, and he was kind of excited and nervous with himself. He spent four or five hours during his visit on Eddy Street. They sat on the porth for a while and he noticed it was getting on Patryas' nerves talking about things, and left, because it was getting on Patryas' nerves. Patryas was underweight at the time. Between 1925 and 1931 he looked much worse. He was weaker. What the matter with him was that he would start to say something and would change his mind and start to say something and would not finish. After 1931 up to the present he saw Patryas' five or six times at his house. He didn't seem to care about anything he sees. Patryas would ask him this and that, and when he would have something to say, Patryas would get a spell over him and all of a sudden Patryas would quit. Between 1931 and the time of testifying Patryas couldn't stand much noise. He would make his family sit quiet, keep the boys quiet and give him his best, because the least little noise, Patryas would holler. It would make him nervous and he would be through. Patryas can't stand noise. So he went over to Patryas' house to take his mind off things. Occasionally they went out for a walk.

49 They would walk three or four blocks or maybe half an hour or three-quarters of an hour. Patryas would begin puffing and get tired and then they would go home. After a while his looks would change. Patryas's eyes and nervousness would come to him and he couldn't come to a condition. Around the family Patryas was always cursing. Between 1925 and 1931 Patryas never went out for a walk alone. During 1925 and 1926 Patryas did not work at all. Patryas didn't try to do anything. In 1931 Patryas complained of headaches, would be unconscious. There wasn't any life in him. This lasted about an hour or three-quarters of an hour. When they went out for a walk in 1931 things didn't look right to Patryas, and he wondered why people stared at him, and his looks would change. That is, the expression on his face changed, and his color changed and he became pop-eyed. They would go out for a walk and he would hold Patryas up, when he would get a sweating spell. This was in 1933. He mistreated his wife and children, told them to be quiet because they disturbed him, and he chased them away.

Cross-Examination.

The fits of unconsciousness which he observed were in Patryas' home on two or three occasions. He was called in by Patryas' children and Patryas was unconscious. When he got there Patryas was vomiting and couldn't be helped. He stood there and looked and then walked out. Didn't know
50 whether to go somewhere for help or not. After observing this he turned around and walked home. The second fit of unconsciousness was in Patryas' home while he was visiting him. When the feeling came over Patryas he went over and laid down on the bed. His hands were white and pale. Patryas remained unconscious for an hour. Didn't run away this time, just stood there and looked at him. All of the things that he testified to existed from 1925, that is, the unconscious fits and his general poor health. His apparent weakness and fits of unconsciousness all existed from 1925.

51 JOSEPH F. KONOPA, called as a witness on behalf of the plaintiff, testified substantially as follows:

Joseph Konopa is a physician and surgeon and lives at 1057 North Hoyne Avenue with offices at 1628 West Division Street. Has been a physician and surgeon in Chicago for about 20 years. Is a graduate of Loyola University, and attending physician at St. Mary's Hospital and the Lutheran Deaconess Hospital. Is in the general practice of medicine. Became acquainted with the Patryas family in 1929, and has been continuously in touch with him since as family physician. Examined the plaintiff Mr. Patryas in the Fall of 1929 in his office. Gave him a superficial examination. He was very nervous, suffering from various nervous conditions, and it looked as though there was some mental condition. At times he would answer and at times he would not. He would not know what the doctor said. As a result of his examination he made a diagnosis of "some mental condition." He was somewhat mentally impaired at the time. In going over the chest he found Patryas had a heart condition. At times his heart would be rapid, at some time slow, and at times it would be skipping beats. Also his pulse showed some reaction of the heart, and he was suffering at the time. There was loss of weight. He was anemic, emaciated, and running temperature, and he concluded there might be some pulmonary tubercu-

losis. After this examination saw Patryas once or twice a month after 1929, both at the doctor's office and at Pat-
52 ryas' home. During these occasions at times Patryas acted like a good man, and at times he would be running up and down the rooms, and when Patryas' wife was sick in bed the doctor would ask him questions when he needed anything, and Patryas would not know what to bring him. Patryas' had another baby in 1931, and when visiting his wife, the doctor also observed Patryas, prescribed medicines for his mental condition and his nerves, and also to help him sleep. Again in 1933 Mrs. Patryas had a miscarriage, and Patryas would frequently call at his office, and once he took him over to the hospital and had X-rays taken of his head, which showed an operation of the right mastoid, and also an infection of the left mastoid. At times Patryas would be better and at times he would be worse.

"Mr. Cross: Q. Would you say this man, from what you found wrong with him was able to do any kind of mental or physical work in 1929 or 1930 when you haw him?

"Mr. Sullivan: I renew my objection to that question, your Honor. No proper foundation has been laid, this man is not qualified; it invades the province of the jury.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. I would say so, he was unable to do any work whatsoever.

"Mr. Cross: Q. Is he able to do any kind of mental work or physical work now.

"A. None.

"Mr. Sullivan: I object to that question for the same reason, your Honor.

"The Court: The objection is overruled, and the answer may stand.

"Mr. Sullivan: Exception."

53 The doctor has had occasion to examine a great number of people afflicted with nervous and mental diseases. In examining Patryas the doctor had him take his clothes off and laid him down on his table and went over his chest with palpatation, auscultation, listened to the heart with his stethescope; took his pulse, went over the entire body while he was lying on the table. His opinion as to his nervous and mental condition he formed from the several different times he saw him from the way he behaved in his office and the way

he talked in his home. By talking he means by asking him questions and having him do things. Fro example, when the doctor was taking care of his wife, the doctor would ask Patryas to get things ready for him, and the doctor observed that he was not able to do so.

"Mr. Cross: Q. Doctor, from your examinations of him have you an opinion based upon reasonable degree of medical certainty as to whether there are any physical, aside from mental and nervous ailments that would prevent him from working, and whether or not the condition will continue?

"Mr. Sullivan: Now, if your Honor please, I want to renew my objection on the same basis. I still do not know what he found. It invades the province of the jury. He has not qualified as a vocational expert. There has been no experience or qualification of him to pass out such a conclusion. There is no testimony from the witness showing what type, if any, of disorder or disease he had, or any diagnosis he made or any physical examination that would justify him making any diagnosis.

"The Court: The objection is overruled.

54 "Mr. Sullivan: May I have an exception to your Honor's ruling?

"The Court: Yes, certainly.

"The Witness: I would say he is not able to work physically, unable physically.

"Mr. Cross: Q. Have you an opinion based upon reasonable medical certainty whether or not this man by reason of nervousness and mental disease was able to do any kind of work, any kind of work, either physical or mental?

"Mr. Sullivan: I object to that question for all the reasons that I stated.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. Well, I will say he is unable to do any work now whatsoever.

"Q. How about 1930 and 1931?

"A. Well, he was unable then as far as I know, he never did work, never did any work; he was on relief, getting some help from city charity.

"Q. Have you an opinion based upon a reasonable medical certainty from your examinations of him, as to whether or not this man will improve or will not improve as the years go by, so as to be able to work?

"Mr. Sullivan: I object to that question. It is asking the doctor the prognosis of the disease.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. Well, my opinion is that his condition is bad; he may at times improve, or he will get worse, or he may remain the same; it is pretty hard to tell just what will become of the man.

"Q. Is there any likelihood he will ever be able to work at mental or physical work?

"A. I will say he never will be able to work.

"Mr. Sullivan: I ask that that be stricken.

"The Court: It may stand.

55 "Mr. Sullivan: Exception.

Cross-Examination.

Has been in practice for 20 years. Keeps some records. In this case didn't have complete records. Didn't bring the records with him. Found rales in lungs in 1929. Sometimes these rales were course and sometimes squeaking. Can determine rales by gross inspection; also with the stethoscope. In determining whether a patient has tuberculosis they make laboratory tests, one of which is a sputum examination. Didn't have this done in Mr. Patryas' case because he said he was going to the Edward Hines Hospital. The next thing the doctor does is to look for blood in the sputum. Didn't see any in Patryas' sputum. Didn't examine Pattyas' sputum. Another symptom of tuberculosis is a continued cough. Patryas coughed off and on. Another thing the doctor looks for in a laboratory test is the white cell count. In a normal person the cell count is between four and five million; and the normal is to ten or twenty million red cell counts. If a person has tuberculosis the White cell count is decreased. If a person has well advanced or moderately advanced tuberculosis the white count is reduced to and will be one or only two million. The red blood count may increase or decrease.

"Q. Now, Doctor, isn't it a fact that the white blood count in a normal person is about six to eight thousand?

"A. I believe that is what I said."

56 The next determination of tuberculosis are X-ray films. Didn't have X-rays made in this case so doesn't know what they would show. Can read the X-ray films. Another

symptom of tuberculosis is a temperature running fromm 100 to 101 at different times of the day. Didn't take Patryas' temperature at different times of day. The most important thing in tuberculosis in making the diagnosis is in getting the various temperatures, but this doctor didn't do that. Remembers that Patryas' pulse at 3 o'clock in the afternoon the first time he examined him was 100. The next time he took his pulse was ten days later, and remembers that it was in the afternoon and that his pulse was about 115. Doesn't remember the pulse of all his patients but remembers the pulse of Patryas because he knew him for so many years. Reported the case to the health department of the City of Chicago as a case of suspected tuberculosis, in 1929. He did not make a positive diagnosis at any time.

When asked what diagnosis of his mental condition he made, the doctor replied "nervous condition." Made a diagnosis of a nervous breakdown, more or less. Prescribes tonics in cases of nervous breakdowns. He usually for cases of this kind prescribes bromides and bromide tablets with a little paragoric and cascara. It is usual to prescribe medicines for any mental condition. He prescribed triple bromide for
Patryas' mental condition, and sometimes other medi-
57 cines. Also prescribed syro-bromides, which are bromides mixed with syrup, for Patryas' mental condition.

Made no special diagnosis of Patryas' heart. Merely knew it was not normal. By anemia, which he testified Patryas had, he means a poor condition of the blood, low count of the hemoglobin. But he didn't make a count of the hemoglobin because the patient said he was going to Hines Hospital for that. Has been experienced in diagnosing mental diseases on a total of ten or twelve cases a year. Never heard of the phrase "constitutional psychopathic inferior." Doesn't know whether Patryas was one or not. Doesn't even know how to go about finding out whether Patryas was a constitutional psychopathic inferior.

Redirect Examination.

Is able to tell whether a person is anemic by looking at him.

Recross Examination.

Is able to tell whether a man is anemic by looking at him without taking his blood count. That would be his sound

medical opinion. If a person came to see him and if the person looked as though he were anemic the doctor would treat him for anemia without doing anything else, but not right away.

58 STANLEY J. PATRYAS, called as a witness in his own behalf, testified as follows.

Lives at 4527 North Mobile. Does not remember how old he is. Was in the army. Enlisted in the army October 10, 1917. Before going into the army worked for Edelman & Company. Before going to France in 1918 he drove a truck in the army, and after arriving in the St. Lazaire Sector his jobs varied between driving a truck and being an assistant helper. From there he was transferred to the Verdun Sector, the Toul Sector, and the St. Mihiel front. On September 9th or 10th, 1918, there was a big drive on the St. Mihiel front which lasted for some time, and the shells were exploding around, and the sky was red and the earth was shaking and trembling. His ear started buzzing from the combustion of shell fire and injured his mastoid. He had no water to drink and nothing to eat. Returned to the United States in 1919. Didn't drive a truck after the big offensive but worked in a mess hall. Was on guard duty for a while and something went wrong with him and he was prosecuted. Was discharged July 29, 1919, at Camp Grant, and he went home. Coming home he had a stroke. Wandered around in a dazed condition and got lost in Lincoln Park. After that he went to work for the Northwest Terra Cotta Company in 1920, May 12th, as a finisher. Continued to work there until August, 1924. Just before he quit working in 1924 he was getting worse and could not keep up his work. At the time he quit working
59 in August, 1924, he was in the wash room and a dark cloud came over him. When the cloud passed away he was on the edge of the fire escape. He became frightened and wondered what was happening to him and feared he would fall off and kill himself. Grabbed the railing and was shivering. Then he was standing in an open elevator and became dizzy. Almost fell down the elevator shaft. Began screaming and started to run, and the foreman told him to go home. Told him to come back when he was fit to work. He was married then. Got married in 1921. After that day

in August, 1924, when he went home from the Terra Cotta Company he didn't go back to work because he could not. From 1924 for the next two or three years he was under the care of different doctors, including government doctors, and in institutions. Went to the Veterans Administration and the Northwestern University clinic and the Tuberculosis Dispensary. July, 1927, he had a mastoid operation at Hines Hospital. The government doctor told him he didn't have mastoid trouble. After the mastoid operation he went home. There was no difference in his feeling after the mastoid operation than before. After the Mastoid operation he continued to have the pains in his head which he has to this day. His hands tighten up and silver streaks fly past his eyes, and white sheets appear before him. Goes out for walks with his wife, but never goes alone and never goes to see anybody.

Has lots of buzzing and head pains even to this date.
60 His chest bothers him and his heart pumps like an engine. At times his heart is very rapid and he has hot and cold flashes, and then he has pains in his gastric region. If he eats he gets cramps and it twists in his stomach and in his eyes. This latter condition has existed since service. The mastoid operation didn't help the pains in his head. When he sweeps the floor at home he gets so weak he has to lay down. When he goes to bed to sleep he has queer dreams and there is no sense in the dreams. His wife gives him things and wakes him up and tells him to stop grinding his teeth, and in his sleep he starts to burst out laughing. Can only walk a block or two without getting sick and having to go home and lie down. Doesn't know whether his oldest boy is 15 years old or not .

Cross-Examination.

After the war was over, and after he had experienced the bursting of shells he still remained in the army, and went with the army of occupation in Germany. Doesn't remember how long he remained in the army after being gassed and shell-shocked.

His signature appears on defendant's exhibit No. 1 (Defendant's Exhibit No. 1 is the Declaration of a Soldier at the time of discharge in which he stated he had no disability or suffered any impairment of health, dated July 29, 1919).

Started to work for the Terra Cotta Company May 12,
61 1920. Received 56 and 58 cents an hour. Worked there continuously until August 26, 1924, and then he quit working on account of his mental condition that came over him. He quite working there in 1924 when his condition became as it is now. There has been no improvement since that time and he has been in the same condition he is now since 1924.

He holds insurance policies with the Prudential Life Insurance Company. Defendant's Exhibit 2 bears his signature. (Reading from Defendant's Exhibit 2, which was an application for industrial insurance in the Prudential Insurance Company.) Doesn't know whether the question "What is present condition of your health?" was asked him, and whether he answered "Good." Took out two life insurance policies since September 10, 1931. Says he did not answer the question "When were you last sick?" by saying "Never serious." Did not make that answer on September 10, 1931 on an application for insurance.

His signature appears on Defendant's Exhibit No. 4 (another application for insurance). Doesn't know whether he applied for insurance again in 1935. Doesn't know whether he has two policies of insurance.

"Mr. Sullivan: Q. 'Does any physical or mental defect or vision impairment exist?'

"A. 'No.' Was that question asked you and did you make that answer on or about the 5th day of December, 1935?

"A. I do not think it was."

Doesn't know how many insurance policies he applied for on December 5, 1935. Is not paying any premiums on
62 them now. His signature appears on Defendant's Exhibit No. 5.

Since he got out of the army he has been living on his compensation, which has amounted to $115.00 a month. His wife draws money from the State of Illinois, and she draws a pension.

63 ANNA PATRYAS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Anna Patryas, the wife of Stanley J. Patryas, lives at 4527 Mobile Avenue. She married the plaintiff in 1921. Had known him about a year before their marriage. He was working at the time of their marriage at the Northwestern Terra Cotta Company. He worked regularly for this company from 1921 to 1924. In the latter part of 1924 he commenced staying at home more than he went to work. He left work entirely in August in 1924. A fellow employee brought him home and Patryas said his head hurt so bad that he found himself on the edge of the fire escape, and they went to the doctor. Didn't do any work after 1924. He would try to help with the housework but he could not do it. Patryas had a mastoid operation on July 19, 1927. Prior to that operation he complained of severe head pains and asked to be sent to the hospital. He went to the Northwestern University Clinic and then to the Hines Hospital. Constantly complained of pains in his head prior to this operation. Was in the hospital for three months and then after he came back he was up and around the house. After his mastoid operation he would get into a rage and choke her and throw things at her, and would mistreat the children. Around 1928 and 1929 went out for walks, but did not visit people, but he did not go alone. He took walks oftener in 1926 and 1927 than he did later.

64 He gets crying spells and "gets up in a fit." Mistreats the children, burns their toes, and doesn't allow them any freedom, and won't allow the radio to be played, and threatened to kill the family. He crumples up his hair and throws things. When he goes out for a walk he tires quickly and perspires, and he becomes pale, and his eyes turn black.

Cross-Examination.

Q. Mr. Patryas, your husband's illness and these things you have described to us have continued since 1924?

A. Yes.

65 DR. HAROLD S. HULBERT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Dr. Hulbert lives in Aurora, and has an office in Chicago. Graduated from Michigan Medical School in 1914. Is now on the staff of three hospitals at Aurora. Taught at Michigan for three years, and at the University of Chicago for nine years, in mental diseases. Has always specialized in mental diseases. During the world war he was a medical officer in the United States Navy. Was on the Chicago State Hospital Residence Staff. Now conducts several psychiatric clinics in mental hygiene.

Constitutional psychopathic inferior is a person who is born inferior. There are many forms. Some are suspicious, others are unstable, and they may go from one form to another. Another group of constitutional psychopathic inferiors are inadequate and unsuccessful in anything. A psychopathic inferior is an emotional and unstable sort of person. Might turn out to be a drug addict. It is easier for a constitutional psychopathic inferior to go insane than a well born person, but very few of them do go insane. A constitutional psychopathic inferior is a permanent condition.

Psychoneurosis is a condition which involves both the nervous system and the mind. Psychoneurosis with C. P. I. means that a person was poorly born, has always been under stress, and never successful, who has become hysterical following some stress which was too great for him to meet
66 or some problem too great for him to solve, and he would have physical symptoms as well as mental symptoms. A psychoneurotic condition is considered curable in a well born person, but incurable in one poorly born if he has had too many severe strains in life. Personally examined Stanley J. Patryas on the 20th of May and on the 25th of May, 1936. (The details of the examination are omitted.) From his examination he diagnosed Patryas as having some kind of organic brain disease which impairs him mentally. He is unreliable and unable to think consistently on things which the average person do. In answer to a hypothetical question in which the doctor was asked to assume as true all the facts in evidence, the doctor stated that he had an opinion that Stanley Patryas was suffering from a disability of his brain

and of his mind; that he had organic shell shock, and the sequences of it are epilepsy and diminution, and precursive epilepsy.

Q. Doctor, have you an opinion based upon a reasonable degree of medical study whether or not this hypothetical man was able in December, 1930, before or after that, after, 1927, able to do any kind of physical or mental work?

Mr. Sullivan: I object to that.

Mr. Cross: Q. (continuing) Of any kind?

The Court: He may answer.

Mr. Sullivan: Exception. It invades the province of the jury, and the Doctor is not qualified to express his particular findings in terms of work, which is a conclusion.

The Court: Overruled.

Mr. Sullivan: He is not qualified as a vocational expert.

The Court: Overruled.

A. No gainful work, he could not be self supporting.

67 Mr. Cross: Q. What is the effect of this brain condition, what is the effect of that in general on the ability of the person to work or function normally?

A. If the frontal lobes particularly are involved, then they cannot work because they are not intelligent enough to work.

Mr. Sullivan: I object to that, your Honor, for the reasons I stated.

The Court: Well, the objection is overruled. It might be sustained on a different ground, that it is not testified here, I believe, that the frontal lobes were involved in this case.

The Witness: Not while he lives can we tell.

Mr. Cross: Q. There is no way to tell that?

A. No way in which we can tell in a living man with certainty, but there are indications.

He has an opinion, however, that the frontal lobes were involved.

Q. Now, Doctor, can you state with a reasonable degree medical certainty, or rather have you an opinion based upon a reasonable degree of medical certainty whether or not this hypothetical man in 1929, 1930 or 1931 had a reasonable chance to improve and be relieved of this condition, or whether it was likely to continue?

Mr. Sullivan: I object to that question. He is asking the prognosis of the disease.

The Court: The objection is overruled.

Mr. Sullivan: Exception.

A. I have an opinion.

Mr. Cross: Q. What is your opinion?

A. It was not a condition which could be improved, that he cannot recover.

This condition will continue until changes take place; that will probable be very rigid when they occur. When the membranes of the brain, the adhesions take place, and after they contract, you may get any complication such as epilepsy, but of itself it does not lead to dementia paralysis.

68 *Cross-Examination.*

Q. So that in your judgment or in your opinion you testify the man was unable to do any work and that has been his condition since 1924 or thereabouts?

A. Yes, I do not think he could be self-sustaining.

Q. Since 1924?

A. That is my statement.

And thereupon the plaintiff rested his case in chief.

69 And thereupon, the defendant, to maintain the issues on its part, offered and introduced the following evidence, to wit:

GEORGE V. COHN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Lives at 3800 Lake Shore Drive. Superintendent of Prudential Life Insurance Company in the branch office located at 4409 Milwaukee Avenue. In response to a subpoena has produced in court Government's Exhibits A, B, and C. Has been with the Prudential Life Insurance Company for 24 years, and is familiar with its form of application.

Government's Exhibit "A" represents an industrial application for industrial insurance in the amount of $500.00. From inspecting the document he is able to say that Policy No. 8796130 was issued thereon. From looking at Government's Exhibit "B" under date of December 5, 1935, he can state that is another industrial life insurance policy in the sum of $500.00. From looking at Government "C" he can state that on December 5, 1935, another industrial life insurance policy was issued to Stanley Patryas in the sum of $500.00.

70 HENRY E. RANDOLPH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Lives at 110 South Oak Street. Is presently employed as a psychiatrist in the United States Veterans' Bureau at Hines, Illinois. Has been there a little over 13 years. Is a graduate of St. Louis College of Physicians and Surgeons, and postgraduate of the University of Michigan. Is a licensed physician and surgeon. Has specialized in mental and nervous diseases. Is chief of the neuropsychiatric service of the outpatients' department at Hines, Illinois. The term constitutional psychopathic inferior means a type of personality, an individual that is not insane or does not necessarily have any functional nervous disorders, but is a certain type of personality. That personality is characterized by unstable emotions, a weak will, and a tendency to escape light responsibilities. In medical science it is not considered a disability and is not a disease. An organic type of mental disorder means that the brain is diseased, that there is some local seat of infection. The functional type of disorder is such as hysteria, neurasthenia, and anxiety state, and there is no diseased process in the brain tissue. A constitutional psychopathic inferior is an inborn condition and is not traceable to any trauma. A constitutional psychopathic inferior is a parasite. They let someone else support them and just drift along in life.

Has no independent recollection of Stanley Patryas.

71 His signature appears on plaintiff's Exhibit 11. From inspecting the document the doctor can state he examined Stanley Patryas on the 22nd of May, 1925. At that time a diagnosis was made of constitutional psychopathic inferior with hysterical manifestations. By inspecting Plaintiff's Exhibit 21 he can state that he examined Patryas on May 6 and April 29, 1930, and made a diagnosis of hysteria on a constitutional psychopathic inferiority basis. Hysteria with organic factors, but the organic factors did not have reference to his mental condition. That was from his physical condition. On June 29, 1933, according to Plaintiff Exhibit 25 he examined Patryas and made a diagnosis of hysteria on a constitutional inferiority basis, organic factors, complete maladjustment.

Is familiar with the disease known as anemia. Could not make a diagnosis of anemia by looking at a man. It is necessary to have a blood count. The white corpuscle blood count in a normal man is between six and eight thousand. If a man had a white blood count of a million or two million he would have a disease known as leukemia, a very grave disease. Has never known a person to live for any length of time with a blood count as high as 2,000,000.

72 *Cross-Examination.*

In making a diagnosis of hysteria with organic factors as appears on Plaintiff's Exhibit 25 he meant that he had some minor physical disability. The mastoid operation did not affect his mind or nervous system. By complete maladjustment he meant that he was not making any affort to do anything for himself. Psychoneurosis means a functional nervous disorder. A constitutional psychopathic inferior becomes less efficient as he grows older. This condition is hereditary. A person might not always have the appearance of a constitutional psychopathic inferior, but may become apparently that way at the age of 25 or 30.

73 ALBERT FIELD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Lives in Downers Grove; is a physician and surgeon, having graduated from Northwestern University in 1904. Has specialized in the eye, ear, nose, and throat branch of his profession for the last 15 years. Is employed by the United States Government at Hines Hospital. Is a medical officer there. Referring to Government's Exhibit marked "D" he states that he examined Patryas on December 7, 1932, and gave him an eye, ear, nose, and throat examination. He was very deaf in the right ear, and had a post-operative mastoid scar, which was well healed at the time; no mastoid symptoms, but he had a mild ear infection in the right ear. The left ear was normal. His hearing was not impaired in the left ear, but he was hard of hearing in the right ear. He was totally deaf in the right ear. That was the same side the mastoidectomy had been performed on. He could not make a diagnosis of anemia by looking at a man. Would have laboratory tests made. Never heard of a person having a white

blood count of one or two million. There was no inflammation of the mastoidectomy scar.

74 *Cross-Examination.*

Has never seen people on the street pale and thin that doctors call anemic. Pallor does not always mean anemia. Taking the blood count is necessary to make the diagnosis. By looking at a person you can become suspicious that he has anemia, that would cause a doctor to desire to verify his judgment by examination.

75 LEON B. BOWES, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Leon M. Bowes is a physicion and surgeon for the last 33 years. On December 31, 1935, he examined Stanley Patryas. Is the examining physician for the Prudential Life Insurance Company. His signature appears on defendant's exhibit No. 5. He signed Defendant's Exhibit 5 apparently as a witness to Mr. Patryas signature and partly as a signature of the examination made. Examined the heart and lungs and the right ear. Did not find any diseases or pathological involvement of the respiratory system. No disease of the heart. The writing on Defendant Exhibit 5, "Has applicant consulted a doctor in the last three years? If yes, when and for what?" Answer: "No." That is in the doctor's handwriting, but the information was elicited from Mr. Patryas. Government's Exhibit "B", dated December 23, 1935, bears his signature. The writing thereon is in his handwriting. At that time there was no discharge from either ear. The hearing in the left ear was normal. Complete loss of hearing in the right ear. At the time the doctor examined him Mr. Patryas was not crying and was not hysterical and faint. It is his place to observe the applicant to see whether he shows any signs of any abnormal, mental, or physical condition, or any physical defects, or any sign of any illness, and in examining Mr. Patryas none of these were apparent, and he noted none.

76 *Cross-Examination.*

The examination was conducted at Patryas' home. Examined his chest with a stethoscope. Looked in his ears with

a light which he carries for that purpose. The examination was made for industrial life insurance.

Whereupon there was offered and received in evidence over plaintiff's objection Government's Exhibit "A", which is in words and figures as follows, to wit:

An application dated September 10, 1931, for $500.00 industrial life insurance with the Prudential Life Insurance Company of America, signed by Stanley Patryas, in which he stated that the present condition of his health was good; that he was never seriously ill, and that no physical or mental defect or infirmity exists.

Defendant's Exhibit "B" is an application for insurance with the Prudential Life Insurance Company dated September 5, 1925, in the sum of $500.00, in which he stated the condition of his health was good.

Defendant's Exhibit "C" dated December 5, 1935, being an application for Insurance in which Patryas stated his condition of health was good.

Whereupon, the defendant rested its case, which was all the evidence introduced by either party.

Whereupon, the defendant moved the court at the conclusion of all the evidence to return a verdict in favor of the defendant on account of the failure of the plaintiff to ad-
77 duce in his behalf substantial evidence that he became permanently and totally disabled while his contract of insurance was in full force and effect. The defendant further moved the court to direct the verdict in favor of the defendant because if there was proof of permanently and total disability; if plaintiff's evidence showed that, it existed since 1924 and the policy upon which this suit was brought did not come into being until 1927.

The Court: Well, I think I will reserve my ruling on that point that you suggest here, of disability existing prior to the issuance of this policy. I will reserve my ruling until after the verdict is returned, and then we can argue that.

Mr. Cross: As I understand, under the law the policy would not issue if he was totally and permanently disabled and defendant is estopped from raising that question.

The Court: I think I would rather take that up when we have time to argue it. You have made your motion?

Mr. Sullivan: I have made my motion.

The Court: And the court reserves its ruling until after the verdict.

Mr. Sullivan: In the event you overrule the motion I would like to have the record show an exception.

The Court: Yes. Bring in the jury.

Whereupon the Court overruled the defendant's motion for a directed verdict to which action of the court the defendant then and there duly objected and excepted.

78 Instructions of the Court.

The Court: Gentlemen, in this case there are some questions of law to be determined and some questions of fact to be determined. The question of law, the Judge has to determine; the questions of fact are for the jury to determine. The questions of fact for you to determine in this case are, whether the plaintiff is totally and permanently disabled, and if he is, at what time did that total and permanent disability commence.

I will go a little ahead of my story to say that the form of verdict submitted to you, if you find for the plaintiff, will be, that you will fill in the date when the disability became total and permanent. Those two facts you will decide. The question of the effect of those facts is for the court.

Now, this is a suit on a policy of insurance, it is a contract made by the government just as a private life insurance company makes contracts with individuals, and by this contract the government agreed to pay a certain sum of money to this plaintiff if he became totally and permanently disabled while the policy was in force, and the policy continued in force as long as he continued the making of the monthly payments. For example, if he made the September payment the policy continued in force until the 31st day of October. That is just by way of illustration.

If he became totally and permanently disabled while the policy was in force then he is entitled to recover; if not, he is not entitled to recover.

Now, what is total disability is determined by the words of the policy. It has been told to you by the lawyers that they agree on that, what total disability consists of, that is, that a person is in such condition, in such impairment of mind and body that he is not able to engage continuously and with a reasonable degree of regularity in any gainful occupation or some gainful occupation for which he is fitted.

The disability is permanent if it is reasonably certain to continue throughout the life of the individual.

Now, you have heard testimony here in this case by the witnesses and from the records as to this man's condition, and it is for you to determine from that evidence whether
79 he is totally and permanently disabled, that is, whether he is unable to engage continuously and with a reasonable degree of regularity in some gainful employment, and if you find that he is not, then you will determine whether that disability is reasonably certain to continue throughout his life.

You have heard the testimony of the witnesses. Now, you are not bound to accept anything as a fact because some witness has testified to it. You use your judgment just as reasonable men, just as you would if you were outside the jury box determining the weight to be given to the testimony of any witness who has appeared here. You make take into consideration his interest in the result of the suit, if any; his appearance on the stand; his fairness and candor; his knowledge or lack of knowledge of the matter about which he has testified, and from all those circumstances you determine what weight, that is, how much credit you will give, how far you will believe the testimony of any particular witness, and after having considered the testimony of all the witnesses in that way you make up your mind where the truth lies.

Now, in this case, as in all other civil cases the burden is upon the plaintiff to make out his case by a preponderance of the evidence. Maybe some of you have served in criminal cases and have been told that before a verdict of guilty can be found the guilt of the defendant must be proven beyond reasonable doubt. This is not a criminal case, it is a civil case, and all the plaintiff is required to do is to prove his case by the preponderance of the evidence, that is, the greater weight of the evidence. If the evidence is evenly balanced so that you cannot tell what is the truth the plaintiff has not the preponderance of the evidence, has not shown that he is entitled to recover by a preponderance of the evidence and he cannot recover. If you think in any case any witness wilfully and knowingly testifies falsely to any material fact of the case, then you may set aside the testimony of that witness entirely, or you may do so except as it is corroborated by other credible evidence in the case.

Are there any other matters that you want me to instruct the jury on?

80 Mr. Sullivan: Your Honor, I might suggest that the jury be instructed as to the dates of this policy.

The Court: Yes, that is right, the policy.

Mr. Cross: I think they should be also instructed at the same time this is a converted policy of the former policy and really a continuation of the policy, and it is only necessary for the jury to find that he was permanently and totally disabled at the time he made demand and proof of total permanent disability.

The Court: Well, I am not going to instruct on that because I have instructed the jury to find the dates the disability occurred and I will take care of whatever question arises.

Under the policy the last premium was paid when?

Mr. Lytle: May 1932.

The Court: May 1932?

Mr. Sullivan: The policy became of no force or effect June 1st, 1932.

The Court: Now, if the plaintiff is totally disabled but became totally and permanently disabled after June 1st, 1932, then he cannot recover.

Mr. Sullivan: May I request an instruction that if they find he became totally and permanently disabled—

The Court: I am simply instructing the jury to fix the dates, that is the question.

The jury will fix the dates. If you find the date the plaintiff became totally and permanently disabled, if it was after June 1, 1932, of course, he cannot recover because the policy lapsed then, unless he was totally and permanently disabled on June 1st, 1932, he was not required to make any further payments, but if he was not permanently and totally disabled then and made no further payment, as he did, the policy would lapse.

If you find for the plaintiff your form of the verdict will be:

We, the jury, find the issue for the plaintiff and fix the date of his permanent and total disability at ....., and you can fix the time when he became totally and permanently disabled.

If you find for the defendant the form of the verdict will be:

We, the jury, find the issue for the defendant.

Whichever form of verdict you find will be signed by your foreman, whom you will select when you retire, and by the other eleven members of the jury.

81 Mr. Sullivan: Your Honor, before the jury retires may I make a request?

The Court: Yes.

Mr. Sullivan: I request that you instruct the jury that the plaintiff must show that he became totally and permanently disabled during the life of the policy, and that if he became permanently and totally disabled before July 27th, 1927, he is not entitled to a verdict.

The Court: I haven't had an opportunity to study the policy. I am going to ask them to simply fix the date.

Mr. Sullivan: May I make my record on that?

The Court: Yes, I can hear you when I have an opportunity to read the policy.

Are the exhibits all ready?

Mr. Cross: I think they are all here, at least ours are.

The Court: The bailiff will be sworn.

(Bailiff sworn.)

The Court: Now, gentlemen, you may retire with the bailiff.

Thereupon the jury returned a verdict into open court reading: "We, the Jury, find the issues for the plaintiff, and fix the date of permanent and total disability at the latter part of 1924."

Signed: Foreman, and eleven other jurors.

Thereupon the Court overruled the defendant's motion theretofore made for a directed verdict and findings of fact and conclusions of law to which the defendant then and there duly excepted.

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and includes all of the evidence and proceedings had at the trial, and is hereby settled, signed and sealed in open court and made a part of the record in this cause this 14th day of Nov., 1936.

This is to certify that from time to time the term of court was properly extended herein, for the purposes of settling, signing, and filing the foregoing bill of exceptions.

William H. Holly,
William H. Holly,
District Judge.

No Objection.
Cross & Cross,
by Stephen A. Cross.

84 And on, to wit, the 12th day of September, 1936 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Petition For Appeal in words and figures following, to wit: Filed Sept. 12, 1936.

85 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—40340) * *

PETITION FOR APPEAL.

Now comes the United States of America by Michael L. Igoe, its attorney for the Northern District of Illinois, and feeling itself aggrieved by the final judgment entered in this cause on June 18, 1936, prays that the Court may allow the United States of America to perfect an appeal to the United States Circuit Court of Appeals for the Seventh Judicial Circuit.

Respectfully submitted,
M. L. Igoe,
Michael L. Igoe,
United States Attorney.

86 And on, to wit, the 12th day of September, 1936, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Assignment Of Errors in words and figures following, to wit:

87 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—40340) * *

ASSIGNMENT OF ERRORS.

Now comes the defendant herein, the United States of America, by Michael L. Igoe, its attorney for the Northern District of Illinois, and in connection with its petition for appeal presents this, its assignment of errors, in accordance with the rules relating thereto, and says that in the trial of the above entitled cause and in the records, proceedings and

judgment manifest error has intervened to its prejudice as follows:

1. The Court erred in failing and refusing to instruct the jury at the conclusion of all the evidence to return a verdict for the defendant on account of the failure of the plaintiff to adduce substantial evidence in his behalf that he became totally and permanently disabled during the contract of insurance sued upon.

2. The Court erred in failing and refusing, at the request of the defendant's counsel, to instruct the jury that if they found from the evidence that the plaintiff became totally and permanently disabled prior to June 27, 1927, the date of the issuance of the policy sued upon, that they should return a verdict for the defendant.

88 In connection with this assignment, the following occurred at the trial:

"Mr. Sullivan: Your Honor, before the jury retires may I make a request?

"The Court: Yes.

"Mr. Sullivan: I request that you instruct the jury that the plaintiff must show that he became totally and permanently disabled during the life of the policy, and that if he became permanently and totally disabled before July 27th, 1927, he is not entitled to a verdict.

"The Court: I haven't had an opportunity to study the policy. I am going to ask them to simply fix the date.

"Mr. Sullivan: May I make my record on that?

"The Court: Yes, I can hear you when I have an opportunity to read the policy."

3. The Court erred in permitting plaintiff's witness Konopa to testify over the objection and exception of the defendant as follows:

"Mr. Cross: Q. Would you say this man, from what you found wrong with him was able to do any kind of mental or physical work in 1929 or 1930 when you saw him?

"Mr. Sullivan: I renew my objection to that question, your Honor. No proper foundation has been laid, this man is not qualified; it invades the province of the jury.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"A. I would say so, he was unable to do any work whatsoever.

"Mr. Cross: Q. Is he able to do any kind of mental work or physical work now?

"A. None.

"Mr. Sullivan: I object to that question for the same reason, your Honor.

"The Court: The objection is overruled and the answer may stand.

"Mr. Sullivan: Exception.

"Q. Doctor, from your examinations of him have you an opinion based upon reasonable degree of medical certainty as to whether there are any physical, aside from mental and nervous ailments that would prevent him from working, and whether or not the condition will continue?

"Mr. Sullivan: I object to that question. It invades the province of the jury. The witness is not qualified as a vocational expert, and has no experience or qualification to pass out such a conclusion.

"The Court: The objection is overruled.

"Mr. Sullivan: May I have an exception to your Honor's ruling?

"The Court: Yes, certainly.

"Mr. Cross: Q. Do you understand the question, doctor? Aside from his mental and nervous complaints what is your opinion as to whether or not from his purely physical disabilities he would be able to work at anything?

"Mr. Sullivan: I object to that question.

89 "The Witness: I would say he is not able to work physically, unable physically.

"Mr. Cross: Q. Have you an opinion based upon reasonable medical certainty whether or not this man by reason of nervousness and mental disease was able to do any kind of work, any kind of work, either physical or mental?

"Mr. Sullivan: I object to that question for all the reasons that I stated.

"The Court: The objection is overruled.

"Mr. Sullivan: Exception.

"The Witness: A. Well, I will say he is unable to do any work now whatsoever.

"Q. Is there any likelihood he will ever be able to work at mental or physical work?

"A. I will say he never will be able to work.

"Mr. Sullivan: I ask that that be stricken.

"The Court: It may stand.

"Mr. Sullivan: Exception."

4. The Court erred in permitting Dr. Hulbert, called as

a professional expert for the plaintiff, to testify over the objection and exception of the defendant as follows:

"Q. Doctor, have you an opinion based upon a reasonable degree of medical study whether or not this hypothetical man was able in December, 1930, before or after that, after 1927, able to do any kind of physical or mental work?

"Mr. Sullivan: I object to that.

"The Court: He may answer.

"Mr. Sullivan: Exception. It invades the province of the jury, and the Doctor is not qualified to express his particular findings in terms of work, which is a conclusion. He is not qualified as a vocational expert.

"The Court: Overruled.

"No gainful work, he could not be self supporting.

5. The Court erred in not holding as a matter of law that the plaintiff was not able to recover in this case because all of his evidence, if taken to be true, and if amounting to permanent and total disability, indicated that the plaintiff was permanently and totally disabled before the existence of the policy sued upon.

90 6. The Court erred in failing and refusing to hold as a matter of law at the request of the defendant that there was no substantial evidence that the defendant was permanently and totally disabled at any time.

Wherefore, the defendant, the United States of America, prays that the said judgment of the said District Court of the United States may be reversed and substantial justice done to the parties.

UNITED STATES OF AMERICA,
By M. L. Igoe,
Michael Igoe,
United States Attorney.

91 And afterwards, to wit, on the 12th day of September, 1936, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

92 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Sept 12, 1936.
* * (Caption—40340) * *

ORDER ALLOWING APPEAL.

This cause coming on to be heard upon the petition of the United States for an order of court permitting it to appeal from the final judgment in this cause,

It Is Hereby Ordered, Adjudged and Decreed that the appeal be, and the same is, hereby allowed.

Enter:

BARNES,
Judge.

Dated at Chicago, Illinois, this 12th day of September, A. D. 1936.

82 And afterwards, to wit, on the 12th day of September, 1936 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

83 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—40340) * *

ORDER.

This cause coming on to be heard on the motion of the defendant herein, the United States of America, for additional time to sign, settle and file the bill of exceptions in this cause and for additional time to file a transcript of record with the Clerk of the United States Circuit Court of Appeals,

Now, Therefore, It Is Ordered, Adjudged and Decreed that the time for settling, signing and filing the bill of exceptions be, and the same is, hereby extended to and including the 18th day of November, A. D. 1936, and the time for filing the transcript of record with the Clerk of the United States Circuit Court of Appeals is extended to and including the 27th day of November, A. D. 1936.

Enter:

BARNES,
Judge.

Dated at Chicago, Illinois, this 12th day of September, A. D. 1936.

Nov. 23, 93 And on, to wit, the 23rd day of November, 1936, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Praecipe in words and figures following, to wit:

94 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

PRAECIPE.

To: Henry W. Freeman, Clerk of the U. S. District Court, for the Northern District of Illinois.

Kindly prepare for additional use in connection with the appeal in the above entitled cause the following orders and documents entered and filed of record:

Petition & Notice dated January 16, 1932,

Copy of Ans. dated May 11, 1936,

Order and copy of amended petition, dated April 14, 1936,

Order reserving ruling on motion for directed verdict, dated May 28th,

Copy of verdict dated May 29, 1936,

June 13, 1936—Overruling defendant's motion for judgment on verdict—90 days Bill of Exceptions,

Copy of judgment dated June 18, 1936,

September 12, 1936—allowing appeal and all orders and papers and time for filing Bill of Exceptions and filing record,

Copy of Bill of Exceptions dated November 14th,

Copy of this Praecipe.

Michael L. Igoe,
United States Attorney.

95 Northern District of Illinois } ss:
Eastern Division }

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Stanley J. Patryas *vs.* United States of America No. 40340

as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 27th day of November, A. D. 1936.

Henry W. Freeman,
Clerk,

(Seal)

96 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—40340) * *

CITATION.

The President of the United States, to Stanley J. Patryas and Stephen A. Cross, His Attorney, Greeting:

You Are Hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to order allowing appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Illinois, Eastern Division, and you are ordered to show cause, if any there be, why the judgment against the United States of America should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Judge of the United States District Court of the United States, this 12th day of September, A. D. 1936.

John P. Barnes,
United States District Judge.

Service of the above and foregoing citation is hereby acknowledged and accepted for Stanley J. Patryas, plaintiff, this 12th day of September, A. D. 1936.

Stephen A. Cross.

At the October Term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court House in the City of Chicago on the Sixth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Thirty-Six, and of our Independence the One Hundredth and Sixty-First.

6101

THE UNITED STATES OF AMERICA, APPELLANT

vs.

STANLEY J. PATRYAS, APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And on, to wit, the 12th day of May 1937, the following proceedings were had and entered of record:

Wednesday, May 12, 1937

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. WALTER C. LINDLEY, *District Judge*

6101

THE UNITED STATES OF AMERICA

vs.

STANLEY J. PATRYAS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Keith L. Seegmiller, counsel for appellant, and by Mr. Stephen A. Cross, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards on, to wit, the 21st day of June 1937, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 6101. October Term, 1936—April Session, 1937

THE UNITED STATES OF AMERICA, APPELLANT

v.

STANLEY J. PATRYAS, APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

June 21, 1937

Before EVANS and SPARKS, Circuit Judges, and LINDLEY, District Judge

Stanley J. Patryas entered the military service of the United States in 1917 and was honorably discharged July 29, 1919. During his service there was issued to him a war risk insurance policy for the sum of $10,000 which remained in full force during the period of his service. Upon his discharge he ceased to pay the premiums due thereon and the policy lapsed on August 1, 1919. The policy was reinstated on July 1, 1927, and immediately converted into a so-called Government five year converted term policy. All premiums were paid thereon up to and including the month of January 1932. When the original policy was reinstated all back premiums were paid by the imposition of a lien against said policy in the sum of $773.90.

A claim for disability benefits under the converted policy was filed early in 1931. Action was instituted on January 15, 1932. No further premium payments were made on the converted policy after January 1932. Appellee sought recovery of $57.50 per month from July 1, 1930. The recovery was limited to a date not exceeding six months prior to the date of making claim for total and permanent disability payments which in this case was January 1931.

The policy, following the statute, contained an incontestable provision excepting only fraud and non-payment of premiums. The policy was not inserted in the bill of exceptions and is not before us. The appellant denied that the insured was at any time totally and permanently disabled. At the close of the trial it moved for a directed verdict on two grounds: (a) That permanent and total disability was not established; and (b) if it existed, it went back to a date prior to the issuance of the converted policy. The case was submitted to a jury who found that the date of the insured's permanent and total disability was the latter part of 1924.

The court entered judgment for appellee for $3,737.50, being the accrued monthly installments at the rate of $57.50 per month from January 25, 1931, to May 25, 1936, less $1,198.49, which represented the lien created against the policy ($773.90) together with interest thereon from July 1, 1927, to June 18, 1936, at 5 percent.

EVANS, Circuit Judge: Appellant challenges the judgment solely on the ground that the insured became totally and permanently disabled in the latter part of 1924, which was before the issuance of the converted five year policy. Its position is that the policy which was sued upon did not cover payments for total and permanent disability which occurred prior to the issuance of the policy.

The Government raises no fact question—that is, it does not here question the totality and permanency of the insured's disability. The record probably justifies this position and would support such a finding by court or jury. It is not the clearest imaginable case of total disability, although tolerably plain on the permanency of the disabilities. Appellee's condition might well be said to be congenital. Mental limitations and mental disturbances are, so the record indicates, back of the physical weaknesses. It is not quite clear how he was ever accepted for military service. The Government was fully informed of the insured's condition at the time his insurance was reinstated. Insured was at the time in the hospital, receiving free treatment from the Government. When the affliction from which he was obviously suffering rose to the total and permanent disability stage may well be said to be a disputed issue of fact. Even when the claim of disability was filed in 1931, it was denied by the Department on the ground that insured was not totally and permanently disabled. Later, when this action was begun, the appellant, in its answer, denied the totality and permanency of the disability. It was only after the trial and the jury found that the total and permanent disability existed as far back as 1924 that the Government took the position that liability was there avoided.

The Government has collected numerous cases which hold that there can be no recovery under the total and permanent disability clause of a converted policy where it is shown that such disability occurred prior to the issuance of the converted policy.[1] It may be said, however, that the decisions are not unanimous.[2]

Notwithstanding the weight of the authority to the contrary, we are unable to give to the incontestable clause the construction which would deny a right to recover in all cases where upon trial a jury finds that the total and permanent disability existed prior to the issuance of the converted policy.

Not only is there an incontestable clause which confronts the Government but there are facts which establish an estoppel.

In the instant case there was no avoidance of the incontestable clause on the ground of non-payment of premium or because of fraud. If the evidence indicated that the insured had defrauded the Government or the total and permanent disability was concealed, we would have a materially different case from the one before us.

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[1] *Hicks* v. *U. S.*, 65 F. (2d) 512 (C. C. A. 4); *U. S.* v. *Kaminsky*, 64 F. (2d) 735 (C. C. A. 5); *U. S.* v. *Stevens*, 64 F. (2d) 853 (C. C. A. 8); *U. S.* v. *Molver*, 77 F. (2d) 208 (C C. A. 4); *Davis* v. *U. S.*, 57 F. (2d) 871 (D. C. Va.); *Jordan* v. *U. S.*, 36 F. (2d) 43 (C. C. A. 9); *Anderson* v. *U. S.*, 36 F. (2d) 45 (C. C. A. 9); *Bolger* v. *U. S.*, 60 F. (2d) 560 (D. C. Mass.); *Schmidt* v. *U. S.*, 63 F. (2d) 390 (C. C. A. 8).

[2] *U. S.* v. *Chandler*, 77 F. (2d) 452.

Here the Government was better informed of the state of the physical and mental condition of the insured than Patryas was himself. The Government had a difficult situation to deal with. Not only was there doubt about the elapse of the original war risk policy written during the insured's services but there were anxieties over the moral obligation which the Government has so willingly and generously assumed toward all the world war veterans. It was in the face of this situation, the facts of which were well known to the Government, that the insured, who occupied somewhat the status of a ward, was advised to apply for and secure reinstatement of the old war risk insurance policy. The ward consented to the payment of all premiums he had failed to pay since his discharge from service, through the imposition of a substantial lien against the reinstated policy. In fairness to appellant it should be said that it did not concede permanent and total disability to exist at this time. Neither did the appellee assert such a condition, assuming he was able to make an intelligent election. After the reinstatement took place the insured, again apparently acting upon the advice of the Government, surrendered this insurance and took out the five year converted insurance policy.

These facts are hardly consistent with the Government's present position, which denies all liability under the converted policy for total and permanent disability alleged to exist at the time the policy was executed.

They were inconsistent with its present position. If appellee were totally and permanently disabled when he was discharged (a controverted issue), he was not required to pay premiums during such disability. His old policy was then in full force, and disability payments were due under it. Insured waived his right to claim such benefits and in return the Government reinstated the policy. The insured also waived his right to assert the absence of premiums due and consented to the creation of a lien equal to such premiums. The Government was again the gainer. To permit it to take advantage of the insured's waivers, and then repudiate liability under its contract would be unjust. It is estopped from so doing.

Moreover, we are unable to understand why the incontestable clause is not binding upon appellant. We have recently had occasion to construe an incontestable clause in two cases involving policies written by private insurance companies.[3] An incontestable clause in a policy written by the Government must be construed the same as one written by private insurance companies. The word "incontestable" means incontestable. Its meaning is well understood when used in life insurance contracts.

Exceptions to incontestable provisions may be made and if they appear in the policy will be given effect. Courts, however, can not add exceptions and thereby defeat the well understood meaning of the word "incontestable."

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[3] *Service Life Ins. C. v. Weinberg*, 81 F. (2d) 359; *State Mutual Life Ins. Co. v. Stapp*, 72 F. (2d) 142.

In the present case two exceptions to the incontestable clause were made. Neither is involved here. We are therefore at a loss to understand why the recovery should be defeated because the condition of the insured's health and mentality at the time the policy was written indicated the possibility, and in fact the likelihood, of early liability arising under the contract.

It is worthy of note that the risk did not cover disabilities existing prior to the date of the policy. This policy covered future total and permanent disability benefits—monthly disability payments accruing after, not before, the issuance of the policy. It was known, of course, to both sides that one might be suffering from physical afflictions and ailments which could grow better as well as worse. Insurance necessarily deals with the future, the uncertainties of which are known to and may be discounted or anticipated by both insurer and insured. We are unwilling to adopt a construction of an incontestable clause as applied to disability liabilities such as here urged by appellant.

There exists another reason for affirmance of this judgment. The record does not contain the policy and appellant's ground for a directed verdict is the absence of any evidence which would justify a recovery. We are not making the failure of appellant to include all the evidence in its bill of exceptions the sole basis of our decision, however, for we assume that the statute defines and fixes the incontestable provisions of the policy in question.

Affirmed.

And on the same day, to wit, the 21st day of June 1937, the following further proceedings were had and entered of record:

Monday, June 21, 1937

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge

6101

THE UNITED STATES OF AMERICA

vs.

STANLEY J. PATRYAS

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment in the said District Court in this cause be and the same is hereby affirmed.

And afterwards on, to wit, the 13th day of July 1937, the mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 7, inclusive, contain a true copy of the papers filed and proceedings had (excepting appearances of counsel, stipulation for extension of time, and briefs of counsel) in the case of The United States of America *vs.* Stanley J. Patryas, No. 6101, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 10th day of September, A. D. 1937.

[SEAL]

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938